A

TOYOTA CAPITAL MALAYSIA SDN BHD v. PP & ANOTHER CASE

HIGH COURT MALAYA, JOHOR BAHRU
MOHD SOFIAN RAZAK J
[CRIMINAL APPEALS NO: 42 ORS-1-01-2014 & 42-ORS-2-01-2014]
B 6 JANUARY 2015

HIRE PURCHASE: *Forfeiture – Forfeiture of vehicle under hire – No criminal charge preferred against hirer or guarantor – Application for release of seized vehicle by financier and guarantor – Whether vehicle an illegal property – Whether*
C *guarantor had locus standi to institute claim – Whether vehicle to be released to financier/owner – Dangerous Drugs (Forfeiture of Property) Act 1988, ss. 25, 32, 35*

CRIMINAL PROCEDURE: *Forfeiture – Dangerous drugs – Forfeiture of property – Application for release of vehicle and monies allegedly associated with drug trafficking – Dangerous Drugs (Forfeiture of Property) Act 1988 – Whether*
D *properties acquired through lawful means – Whether appellants lawfully entitled to properties – Presumption of illegal property under s. 35 of Act – Whether applicable to proceedings under s. 32 – Whether properties obtained through legitimate sources of income – Dangerous Drugs (Forfeiture of Property) Act 1988, ss. 25, 32, 35*

E ***WORDS & PHRASES:*** *'any proceeding' – Section 32(2) Dangerous Drugs (Forfeiture of Property) Act 1988 – Meaning and purport*

A police team investigated a premise which was occupied by one Balwant Singh ('Balwant') and his family members. At the said premises, the police seized: a Toyota Hilux bearing ('E1'); cash in the sum of RM14,180 ('E2');
F and cash in Singapore currency in the sum of SGD 300 ('E3'). E1 was purchased by Balwant's son ('SP2') from Toyota Capital Malaysia Sdn Bhd ('Toyota Capital'). Balwant stood as the guarantor for the said purchase. Having a reasonable belief that the properties constituted illegal properties under the Dangerous Drugs (Forfeiture of Property) Act 1988 ('Act'), the
G police issued a forfeiture notice on Balwant pursuant to s. 25(2) of the Act. Balwant then applied under s. 32(2) of the Act for all the properties to be released. Toyota Capital also applied for the release of E1 as it was the registered owner of the vehicle under a hire-purchase agreement ('HPA') which it had with SP2 as the hirer. In accordance with the requirements of
H s. 32(2) of the Act, the respondent ('prosecution') referred Balwant's and Toyota Capital's claim to the Sessions Court for determination. The Sessions Court Judge ('SCJ') held that Balwant and Toyota Capital had failed to rebut the presumption under s. 35 of the Act to entitle the release of the properties. Accordingly, the SCJ ordered E1, E2 and E3 to be forfeited to the
I government. Balwant and Toyota Capital appealed to the High Court, respectively. The issues that were raised during appeal by both Balwant and Toyota Capital, *inter alia*, were: (i) whether the SCJ had erred in law in applying the presumption of illegality under s. 35 of the Act to a claim made under s. 32(2) thereof; (ii) whether a notice under s. 32(2) of the Act had to

be served on SP2 instead of Balwant; (iii) whether Balwant as a guarantor of SP2 had *locus standi* to claim for the release of E1; (iv) whether Balwant and Toyota Capital had successfully rebutted the presumption under s. 35 of the Act on a balance of probabilities.

Held (dismissing Balwant's claim; releasing vehicle to Toyota Capital):

(1) There was no requirement in law for the notice of forfeiture under s. 25(2) of the Act to be served on the hirer *ie*, SP2. Even if no notice under s. 25(2) of the Act was served on SP2, that did not prohibit any person including SP2 to make any claim that he was lawfully entitled to such property and that it was not liable to forfeiture under the Act or under the Dangerous Drugs Act 1952. (para 15)

(2) The presumption under s. 35 of the Act was applicable to a proceeding under s. 32(2) of the Act. The words 'any proceedings' should and must be given the ordinary meaning that it covered all proceedings under the Act. The burden of proof was on Balwant and Toyota Capital to rebut the presumption which was on a balance of probabilities that the properties in question were not illegal properties and that they are lawfully entitled to the properties. It placed no burden on the Public Prosecutor to prove anything. (paras 13, 16 & 17)

(3) Balwant had failed to adduce sufficient evidence to rebut the presumption that the properties in question were not illegal properties. Balwant's evidence that the said vehicle was bought on hire to start off a business of buying and selling fish was without any cogent documentary evidence. The money in the sum of RM14,180 and SGD300 found in SP2's locked locker which was alleged to be used as working capital in the fish business was also unacceptable. Balwant and SP2 had not rebutted the presumption that the properties E1, E2 and E3 were illegal properties. Nevertheless, since Balwant was a mere guarantor, he had no propriety right over E1 and hence he had no *locus standi* to claim for the release of E1. The court thereby dismissed the appeal by Balwant and affirmed the forfeiture order on E1, E2 and E3 by the SCJ. (paras 14, 19 & 20)

(4) Toyota Capital had successfully rebutted the presumption that the Toyota Hilux was an illegal property. Toyota Capital had no control over the conduct of SP2 after the HPA had been signed. To impose other onerous conditions on Toyota Capital such as that it must ensure that the down-payment and the monthly instalments would be from a legitimate source of income by the hirer unless Toyota Capital had prior knowledge thereof, would be contrary to public policy and was not within the framework of the banking and financing industry. Toyota Capital could not be faulted for the conduct of the hirer which resulted in the forfeiture of the said vehicle. Therefore, the court would allow Toyota Capital's appeal and order the Toyota Hilux to be released to them. (paras 21 & 22)

Case(s) referred to:
Cherian KC George & Anor v. PP [2012] 6 CLJ 17 CA ***(refd)***
Jason Chan Huan Sen & Ors v. PP [2015] 2 CLJ 605 CA ***(refd)***
PP v. Lim Kim Hoei & Anor [2014] 4 CLJ 816 CA ***(refd)***

Legislation referred to:
Dangerous Drugs (Forfeiture of Property) Act 1988, ss. 2(2), 8, 25(2), 32(2), (3), 35

For the applicant (Toyota Capital) - Amalina Marsita Hamdan (Yaacob Atan with her); M/s Zaid Ibrahim & Co
For the respondent - Nor Iffa Zarilla Abd Rahman; DPP

Reported by Sandra Gabriel

JUDGMENT

Mohd Sofian Razak J:

Preliminary

[1] The appeal in Case No: 42-ORS-1-01-2014 by Toyota Capital Malaysia Sdn Bhd and the appeal in Case No: 42-ORS-2-01-2014 by Balwant Singh a/l Darchan Singh came up for hearing on 16 December 2014 and were heard together. The court heard the appeal in case No: 42-ORS-2-01-2014 first and followed by the appeal in Case No: 42-ORS-1-01-2014. For purposes of these appeals the parties shall be referred to as they were in the court below. The appellant in Case No: 42-ORS-2-01-2014 shall be known as the first appellant and the appellant in Case No: 42-ORS-1-01-2014 shall be known as the second appellant. The court heard submissions from both learned counsel and the learned Deputy Public Prosecutor and adjourned the matter for decision to today.

Factual Matrix Of The Case

[2] On 21 January 2013 a police team investigated a premise at No: 14, Jalan EJ 3/6, Taman Ehsan Jaya Johor occupied by the first appellant and his family members. At the said premise, the police seized the following properties namely a Toyota Hilux bearing registration No. JML 3993 (E1), cash in the sum of RM14,180 (E2) and cash in Singapore currency in the sum of SGD 300 (E3) on the ground that the police had reason to believe that these properties constituted illegal properties under the Dangerous Drugs (Forfeiture of Property) Act 1988 (hereinafter called 'the Act'). As a result of the seizure of the properties, a police report was lodged at the Seri Alam Police Station *vide* Report No: 000699/13 and thereafter the police issued a notice of forfeiture on the first appellant pursuant to s. 25(2) of the Act. The first appellant by letter dated 6 February 2013 applied under s. 32(2) of the Act for all the properties to be released to him on the ground that they were lawfully entitled to those properties. It is also not disputed that the second appellant had also sent a letter to the police that the property E1 which is the Toyota Hilux be released to them as the second appellant is the registered

owner of E1 and SP2 was at all material time the hirer under a hire-purchase agreement. The first appellant was at all material time the guarantor under the hire-purchase agreement. In accordance with the requirements of s. 32(2) of the Act, the respondent referred the first and second appellants' claim to the Sessions Court for determination. The Sessions Court then pursuant to s. 32(3) issued a summons requiring the person claiming that he is lawfully entitled to the property and the person from whom the property was seized to appear before the court. The learned Sessions Judge (hereinafter called 'the learned SCJ') held after hearing evidence from SP1, SP2 and SP3 respectively, held that the first appellant and second appellant had failed to rebut the presumption under s. 35 of the Act to entitle the release of the properties to them. Accordingly the learned SCJ ordered the properties (E1, E2 and E3) to be forfeited to the Government.

[3] Learned counsel for the first and second appellants together mounted a common front in that the learned SCJ had erred in law in applying the presumption in s. 35 of the Act to a claim made under s. 32(2) for the release of such property. This is because under s. 32(2) no proceeding is brought against any person or in respect of any property on the ground that such a person is a liable person or that such property is illegal property.

[4] Learned counsel anchored their argument by relying on the Court of Appeal case of *PP v. Lim Kim Hoei & Anor* [2014] 4 CLJ 816. The brief facts of *Lim Kim Hoei (supra)* are almost similar to the facts in the instant appeal in so far as the appeal involving the first appellant is concerned.

[5] In gist, learned counsel echoed the sentiment expressed by the court in *Lim Kim Hoei (supra)* in that although the examination by the Sessions Court of the appellants' claim for the return of the seized properties under s. 32(2) was a proceeding under the Act as defined in s. 2(2), it was however not a proceeding brought by the Public Prosecutor against the appellants in respect of the seized properties on the ground that such properties were illegal properties as provided in s. 35. Since s. 32(2) is not a forfeiture proceeding under the Act, the question of the property claimed being presumed to be an illegal property under s. 35, unless it is proved to the contrary by the appellant, does not arise at all. The only burden on the appellants is to adduce sufficient credible evidence that the properties were acquired by the first appellant through lawful means and that they are lawfully entitled to such properties. The fact that the Public Prosecutor did not take forfeiture proceedings under s. 8 of the Act but instead allowed the police to refer the first appellant's claim to the Sessions Court for determination showed that the Public Prosecutor had no reasonable grounds to believe that the seized properties were illegal properties. Learned counsel submitted that through the evidence of SP1, SP2 and SP3 it as showed on the balance of probabilities that the seized properties were acquired through lawful means by the first appellant and that no offence under the Act had been committed in respect of any of the seized properties.

[6] Learned counsel for the first appellant further submitted that the circumstances in which the seized properties could be released to the first appellant are (i) where no offence under the Act has been committed with regards to claiming the seized properties; (ii) that the seized properties are not illegal properties. The burden is on the Investigating Officer to show to the court that the properties seized are properties where an offence under the Act has been committed and the seized properties are illegal properties. The respondent had called SD4, the Investigating Officer to testify and it was quite apparent that there was no reasonable reason to forfeit the seized properties. SD4 was unable to inform the court as to the actual basis for the forfeiture except to state that the investigation was carried out following a Johor Jaya Report No: 1028/2013. It is incumbent upon SD4 that such facts must come from him as the Investigating Officer in charge of the case and he must assist the learned SCJ in the determination of the same. SD4 also agreed that he had not complied with s. 25(2) of the Act by not serving a notice of forfeiture on the registered owner of Toyota Hilux (E1).

The Evidence In Rebuttal Of Presumption

SP1 – Balwant Singh a/l Darchan Singh

The Narrative Of His Evidence Are As Follows

[7] SP1 owns a double storey house together with his family members. He was using his son's Toyota Hilux registration No: JML 3993 who had purchased the said vehicle on hire-purchase from the second appellant. SP1 usually used the Toyota Hilux to sell fish together with his son whose name is Arijan. He further stated that on 21 January 2013, a police team had waited in front of his house. The police did not show any authority card when they entered the house compound and went straight up to the first floor of the said house and seized the sum of RM14,180 and SGD 300 from Arijan's room. The witness admitted receiving the forfeiture notice in Form 22A. The witness also agreed that in the hire-purchase agreement the registered owner of Toyota Hilux was Arijan Singh a/l Balwant Singh. In the course of re-examination, the witness said that he was not claiming for the release of the Toyota Hilux as a registered owner but claiming on the basis that it was taken from his possession. As regard the amount of RM14,800 was quite normal for him to have kept that much of money for his buying and selling of fish which he bought from Sedili. At any one time he purchased between RM4,000-RM6,000 worth of fish.

SP2 – Arijan Singh a/l Balwant Singh

[8] The witness testified that he stayed with his family which includes his father, mother, brother and sister. He owns a Toyota Hilux registration No: JML 3993 (hereinafter called 'the said vehicle') which he bought in 2013. At the time when he bought the said vehicle he was a contract worker. The said vehicle was purchased from Toyota Capital and SP1 was the

guarantor. The said vehicle was used by the family to carry business of buying and selling fish. The said vehicle was seized from his house on 21 January 2013 by the police. The witness denied that the said vehicle was used in the commission of any drug offence and also denied that the purchase of the said vehicle was by illegal means. The witness said that he had been paying the monthly instalment without fail. The witness said that he is in court to claim the release of the said vehicle. He also testified that the police did not issue a notice of forfeiture to him as the hirer. With regard to the forfeiture of the sum of RM14,180 and SGD 300, the money were kept in his room in his locked locker. The said money was meant for business in buying and selling fish. He did not bank in the money because they had to go and buy the fish between 6-6.30am in the morning and the bank is not opened yet. The said money was also meant for the working capital for the fish business. The witness also agreed that the money was not illegal money nor drug money. He also stated that the said vehicle was not used in the trafficking of drug. In cross-examination by counsel for the second appellant, the witness agreed that the said vehicle was still under finance and is still on going. In answer to questions posed by the learned deputy, the witness disagreed that the amount of RM14,180 kept in the house was a big amount in the business he was engaged in.

SP3 – Mohd Faiz bin Amran

[9] The witness testified as an authorised representative of Toyota Capital Sdn Bhd which had financed the purchase of Toyota Hilux registration No: JML 3993 where the guarantor was SP1. The witness testified that Toyota Capital Sdn Bhd is the registered owner whereas SP2 is the hirer. The hirer paid the sum of RM10,034.90 as deposit and as at 1 July 2013 the amount paid by way of monthly instalments was RM35,672.53 over a period of 36 months. The HP agreement will expire in 2017 and the ownership claim is with Toyota Capital Sdn Bhd.

[10] In cross-examination by learned counsel for the first appellant, the witness agreed that the terms and conditions imposed by Bank Negara before a hire-purchase agreement could be approved is quite stringent. In the particulars of the hire-purchase application it was noted that SP2 had fulfilled the terms and conditions of the hire-purchase agreement. SP2 at the material time was employed as a site manager and having a net income of RM3,095.25 which is more than sufficient to enable him to get the financing from the second appellant.

SD4 – ASP Hairy bin Ramlan

[11] He was the Investigating Officer of the case. He had seized three properties namely a Toyota Hilux registration No: JML 3993, cash money in the sum of RM14,180 and SGD 300 pursuant to s. 32(2) of the Act. In the course of his investigation he did not receive any documents pertaining

to lawful sources of income. In cross-examination by learned counsel for the first appellant, the witness explained that a notice of forfeiture under s. 25(2) could not be served on SP2 because efforts to trace him failed. The witness further stated that a summons under s. 32(3) had been issued to Toyota Capital Sdn Bhd.

The Submission Of Learned Counsel For Second Appellant

[12] That SP2 was never charged for any drug offence nor was he involved in any offence involving the said vehicle. Learned counsel then referred to s. 35 of the Act, and said that the learned SCJ had erred in fact and law in invoking the presumption under s. 35 to a proceeding under s. 32(2) of the Act. Learned counsel also referred to the case of *PP v. Lim Kim Hoei (supra)* and was of the view that the learned SCJ had wrongly invoked the presumption under s. 35 to a proceeding under s. 32(2) of the Act. The case of *Jason Chan Huan Sen & Ors v. PP* [2015] 2 CLJ 605 reaffirmed the position in *Lim Kim Hoei (supra)* that the presumption under s. 35 of the Act does not apply against a seized property, the release of which is sought under s. 32(2) of the Act by a claimant as the lawful owner of such property.

The Respondent's Submission

[13] The learned deputy in rebuttal was of the view, relying on *Cherian KC George & Anor v. PP* [2012] 6 CLJ 17; [2012] 2 AMR, that the presumption under s. 35 of the Act is applicable to a proceedings under s. 32 of the Act. Section 35 was intended to apply to all proceedings under the Act. The wordings under s. 35 are very clear. It uses the words "any proceeding". The words "any proceeding" should and must be given the ordinary meaning that it covers all proceedings under the Act. To say that a proceeding under s. 32(2) is not a proceeding that is envisaged under s. 32(3) of the Act would not be in tandem with the intention of the lawmakers and would be in violation of the clear wordings of s. 35 of the Act. Section 35 of the Act places upon the appellants the burden of proving by admissible evidence that the properties are not illegal properties.

The Observation Of The Court And Finding

[14] The court observed that the first appellant in this appeal is a guarantor for SP2 (the hirer) in the HP transaction, and is claiming for the release of *inter alia* the Toyota Hilux (E1). Under the HP agreement, the court is of the view that as a guarantor, he has no propriety right over the said Toyota Hilux even if the amount of the monthly instalments has been fully settled by the hirer (SP2). The first appellant's nexus in the HP transaction is only as per the fact that he stood as a guarantor and if no payment is made by the hirer to the finance company the second appellant, the second appellant could under the guarantee agreement initiate an action against the first appellant. In that sense, the question to be asked is whether the first appellant has the

locus standi to claim for the release of the Toyota Hilux (E1) to him although he was neither the hirer nor the registered owner. In evidence, the first appellant's claim for the release of Toyota Hilux was because the police had taken the said vehicle from him. The court is of the view that the first appellant has no *locus standi* to claim for the release of Toyota Hilux (E1) as a guarantor. However, if the court is wrong on this issue, then the court will consider the other issues raised by the parties.

[15] On the issue that the notice under s. 25(2) of the Act was not served on SP2 who was the hirer but served on the second appellant, the court accepted the explanation given by SD4 that efforts to trace SP2 was of no avail as he could not be located at the address mentioned in the HP agreement. In any event, reading carefully s. 25(2) of the Act, it states that "the officer affecting the seizure shall as soon as practicable serve a notice in writing of the seizure and the grounds thereof on the owner if such owner and his whereabouts are known." In the instant case, the police had served the notice under s. 25(2) of the Act on the owner, the second appellant. The court is of the view that the only requirement under s. 25(2) of the Act is to serve the notice of forfeiture on the owner which the police has done. There is no requirement in law for the notice of forfeiture to be served on the hirer (SP2). However the court is of the view that even if no notice under s. 25(2) of the Act was served on the hirer (SP2), that does not prohibit any person including SP2 to make any claim that he is lawfully entitled to such property and that it is not liable to forfeiture under this Act or under the Dangerous Drugs Act 1952.

[16] On the issue of whether in a proceeding under s. 32(2) the presumption under s. 35 is applicable, the court is of the considered view that the presumption under s. 35 of the Act is applicable to a proceeding under s. 32(2) notwithstanding the decision in *Jason Chan Huan Sen & Ors (supra)*. The court agrees that s. 35 was intended to apply to all proceedings under the Act. The court is aware of the two conflicting decisions of the Court of Appeal in *Cherian KC George (supra)* and *Lim Kim Hoei (supra)* and reaffirmed in *Jason Chan Huan Sen & Ors (supra),* which is a court of coordinate jurisdiction, and this court is at liberty to choose which of the conflicting decisions to follow regardless of when the decisions were delivered. In this respect this court would prefer to follow the decision in *Cherian KC George (supra)*. With that view disposed of, and in line with the decision in *Cherian KC George*, the court reiterated the principle enunciated that s. 35 of the Act places upon the appellants to prove by admissible evidence that the properties are not illegal. It places no burden on the Public Prosecutor to prove anything. The burden has shifted to the appellants.

[17] That being so, the burden of proof is on the appellants to rebut the presumption which is on a balance of probabilities that the properties in question are not illegal properties and that they are lawfully entitled to the properties.

[18] The principal question of law for determination which arose in *Jason Chan Huen Sen & Ors (supra)* is whether the presumption of illegality property under s. 35 of the Act is applicable to a proceeding under s. 32(2) of the same Act. The majority decision in *Jason Chan Huen Sen & Ors (supra)* agreed with the decision in *Lim Kim Hoei (supra)* which ruled on the interplay of these two sections under the Act.

The Evidence

[19] Having perused the evidence in respect of the appeal by the first appellant and the grounds of decision of the learned SCJ, the court is of the view that the first appellant has failed to adduce sufficient evidence to rebut the presumption that the properties in question were not illegal properties. His evidence that the said vehicle was bought on hire to start off a business of buying and selling fish is only wishful thoughts without any cogent documentary evidence. No evidence that a company has been incorporated or registered to venture into the business of selling fish. Anyone can say anything when poised to avoid the forfeiture of the Toyota Hilux. The evidence of SP1, the first appellant did not dispel the presumption that the monthly instalments for the Toyota Hilux was (not) from the fish business. No bank statements were tendered to show how much was earned from the fish business. The money in the sum of RM14,180 and SGD 300 found in SP2's locked locker which was alleged to be used as working capital in the fish business was also unacceptable. The explanation given that if the said money were placed in the bank and since at 6am the bank is still not open to enable him to transact the trade, it will therefore hamper him from making payment to the seller of the fish, is also hard to comprehend. In this age of advanced technology, banking transactions could be done electronically or the payment would not have to be made as early as by 6am in the morning. SP1 and SP2 did not call the fish seller who supplied them with the fish to testify that he was really selling fish to SP1 and SP2 and wanted the payment to be made by cash. The court is not convinced at all that the explanation by SP1 and SP2 in the circumstances has rebutted the presumption that the properties E1, E2 and E3 are illegal properties as defined in s. 2 of the Act which states *inter alia* that: "illegal property" means "which is wholly or partly derived or obtained from or by means of any prohibited activity carried out by any person after the commencement of this Act."

[20] The court hereby dismissed the appeal by the first appellant and affirmed the forfeiture order on E1, E2 and E3 by the learned SCJ.

[21] On the appeal by the second appellant on the Toyota Hilux (E1), the court has perused the evidence and found that the second appellant to have successfully rebutted the presumption that the Toyota Hilux was an illegal property.

[22] The facts of the case showed that the Toyota Hilux was never an illegal property right from the beginning when the HP agreement was signed. It was bought under the valid HP agreement and in compliance with Bank Negara requirement guidelines. To impose other onerous conditions on the second appellant, such as to ensure that the down payment and the monthly instalments would be from a legitimate source of income by the hirer, unless the second appellant has prior knowledge to the illegitimate source thereof, would be contrary to public policy and is not within the framework of the banking and financing industry in this country. The position in respect of the second appellant as the owner/financier of the said vehicle is different from the position of the first appellant. The position of the second appellant must be viewed from a perspective of a player in the banking and finance industry regulated by Bank Negara. The second appellant's concern is for the monthly instalments to be paid promptly regardless of who pays it. It could be by a third party which is of no concern to the second appellant. The second appellant has no control over the conduct of SP2 (hirer) after the HP agreement has been signed. The second appellant was not in the position to prevent SP2 to not to indulge in unlawful activities such as using the car for activities in drug trafficking, or ensure that the monthly instalment is not from an unlawful activity and so forth. Any action against the hirer which results in the forfeiture of the vehicle financed by the second appellant, is grossly unfair to the second appellant. The second appellant cannot be faulted for the conduct of the hirer which resulted in the forfeiture of the said vehicle.

[23] Based on the reasons as adumbrated above, the court would hereby allow the appeal by the second appellant and therefore order that the Toyota Hilux (E1) be released to the second appellant as the financier/owner of the said vehicle.